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Office of Administrative Law Judges
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Issue Date: 10 June 2003

In the Matter of:

GUS MARSHALL,
Claimant

Case No. 2000-LHC-2437
OWCP No.: 6-181126

v.

FLORIDA STEVEDORING COMPANY,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier

Appearances:

Marc R. Silverstein, Esq.
Silverstein & Silverstein
Miami, Florida
For the Claimant

Laurence F. Valle, Esq.
Frank Sioli, Esq.
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Miami, Florida
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by Claimant Gus Marshall against his Employer Florida Stevedoring, Inc., and its insurance Carrier Signal Mutual Indemnity Association, Ltd. The Act provides for payment of medical expenses and compensation for disability or death of maritime employees other than

seamen injured on navigable waters of the United States or adjoining areas. In this case, the Claimant alleges that he was disabled by a fall from the top of a shipping container on November 19, 1999.

I conducted a hearing on this claim on July 27, 2001, in Fort Lauderdale, Florida. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant's Exhibits ("CX") 1-41 and Employer's Exhibits ("EX") 3, 4, 6, 8, 9, 10, 20, 21, 23, 28, 30, 31 (by stipulation, excluding the evaluation and rating of the right foot, *see* Tr. at 22) and 32 were admitted into evidence without objection.[1] Transcript ("Tr.") at 13-17. A portion of EX 29 (the May 18, 2001 report) was admitted, but the remainder of the exhibit (all job leads identified on or after July 6, 2001) was excluded as untimely. *See* Tr. at 6-9,166-170, 190-200. The record was held open after the hearing to allow the parties to submit additional evidence and argument. I hereby admit the following additional exhibits which have been submitted by the parties: a stipulation signed by both parties, Joint Exhibit ("JX") 1; records from the Jackson Heights Rehabilitation Center, CX 43; Claimant's tax returns, EX 1; transcript of the deposition of Dr. Paul S. Jarrett taken August 16, 2001, EX 34; and records from the Jackson Heights Rehabilitation Center, EX 35. Records of Dr. Lawson dated July 30, 2001, regarding his review of job leads excluded from EX 29, have been assigned an exhibit number, EX 33, but not admitted. The parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

STATEMENT OF THE CASE

On November 19, 1999, the Claimant was working detaching containers from a vessel. In the process of moving from one container to another, he slipped and fell about 16 feet from the top of a container. He was taken by ambulance to the Parkway Regional Medical Center. X-rays revealed multiple fractures in his right foot. Thereafter he was evaluated by an orthopedist, Dr. Jay Stein, who recommended a referral to an orthopedic surgeon. Dr. Rodolfo Lawson performed surgery on the right foot on November 28, 1999. Claimant began physical therapy on April 3, 2000. In February 2001, Dr. Lawson stated that Claimant had reached maximum medical improvement, and recommended permanent limited duty status with restrictions of lifting no more than 20 pounds, and no prolonged walking, running, or climbing. Dr. Thomas Zwick, a podiatrist, also examined the Claimant's foot on behalf of the Employer/Carrier on May 17, 2001. The parties stipulated to a 39% permanent partial impairment to the right foot, equivalent to a

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[1]EX 6, 21 and 30 were offered by the Claimant, but have been retained with the Employer/Carrier's exhibits to avoid duplicating numbers from Claimant's exhibits. CX 42, Mrs. Marshall's death certificate, was admitted with leave to submit a copy post-hearing, but replaced with a stipulation that the date of her death was December 6, 1997. Tr. at 12-13; 266.

27% permanent partial impairment to the right lower extremity.

Claimant contends that in addition to the problems with his right foot, he complained from the beginning about back problems and headaches, but the Employer/Carrier never authorized treatment for those complaints. Claimant attributes his back problems to the fall. Eventually, on January 18, 2000, he consulted a chiropractor, Dr. Ryan Fisher. The Claimant paid for treatment by Dr. Fisher himself. Dr. Lazaro Guerra, an orthopedist, examined Claimant's back on April 11, 2000. Dr. Guerra recommended an MRI, which the Employer/Carrier did not authorize. Eventually an MRI conducted on May 5, 2001, led to a diagnosis of multiple herniated discs in the lumbar spine. Dr. Gaetano Scuderi, an orthopedist specializing in backs, examined the Claimant on behalf of the Employer/Carrier on May 21, 2001. He did not agree that Claimant needed treatment for his back, and attributed Claimant's the MRI findings to aging rather than the accident.

Claimant also attributes a psychiatric impairment to the accident. He was evaluated by Dr. Gary Magid, a psychiatrist, on January 8, 2001. Dr. Magid recommended therapy and a pain management program. Claimant was also examined by Dr. Paul Jarrett, at the request of the employer, on May 15, 2001. Dr. Jarrett concluded that the Claimant did not need psychiatric treatment.

The Employer/Carrier concedes that the injury to the Claimant's foot was a work-related injury covered by the Act. The Employer/Carrier paid temporary total disability benefits commencing on November 20, 1999, based on an average weekly wage of $300.00, and a compensation rate of $225.32, the minimum for the date of Claimant's accident. The Claimant was still receiving compensation at the time of the hearing. The Employer/Carrier paid medical expenses for treatment of Claimant's foot, but not for treatment of his back or for psychiatric treatment.

The Claimant agrees that he reached maximum medical improvement of his right foot in February 2001, but alleges that his back and psychiatric problems are also work-related injuries stemming from the same accident, and that those have not yet reached maximum medical improvement. He seeks an order requiring the Employer/Carrier to pay his medical expenses for treatment of those conditions as well as his foot. He contends that he is entitled to temporary or permanent total disability benefits, and/or permanent partial disability benefits. He argues that his average weekly wage was higher than the amount relied on by the Employer/Carrier, so that his disability benefits were paid at too low a compensation rate. Claimant argues for an average weekly wage of $625.00.[2] The Claimant seeks compensation, medical benefits, penalties under Section 14(e), 33 U.S.C. § 914(e), attorney's fees and costs.

The Employer/Carrier maintains that only the foot injury was work-related. It also asserts

[2]This is the figure suggested by counsel for the Claimant in his Closing Argument Brief, revised downward from the $790.00 claimed in his Pretrial Statement.

that it paid compensation at too high a rate based on Claimant's earnings history, and that the Claimant's calculation of his average weekly wage is inflated; it argues for an average weekly wage of $8.47-$42.86 per week.[3] It contends that Claimant is entitled only to permanent partial disability benefits for the injury to his right lower extremity, a scheduled injury.

ISSUES

The issues before me are:

1. What injuries are compensable.

2. The nature and extent of the Claimant's disability.

3. The Claimant's average weekly wage.

4. What further medical treatment should be authorized.

5. Whether the Employer/Carrier is responsible for outstanding medical bills.

See the parties' pre-hearing submissions and post-hearing briefs; Tr. at 25-40. Although the Employer/Carrier initially contended that it was entitled to special fund relief pursuant to Section 8(f) of the Act, 33 U.S.C. § 908(f), that issue was withdrawn at hearing. Amended Pretrial Statement filed April 27, 2001; Tr. at 6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties were able to reach the following Stipulations:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq.

2. An employer-employee relationship existed.

3. On November 19, 1999, the Claimant sustained an injury that arose out of and in the course of his employment.

4. A timely notice of the injury was given by the Claimant to the Employer.

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[3]These figures are set forth in the Employer/Carrier's Supplemental Brief Regarding Documents Produced by the Internal Revenue Service.

5. The Claimant filed a timely claim.

6. As a result of the work related accident on November 19, 1999, Claimant sustained a 39% permanent partial impairment to the right foot, which translates into a 27% permanent partial impairment to the right lower extremity.

Parties' Pretrial Statements; JX 1. *See also* the Employer/Carrier's withdrawal of a proposed stipulation as to the Claimant's average weekly wage, Tr. at 9-10.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. *See* 20 CFR § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

Summary of the Evidence

Mr. Marshall was deposed on December 11, 2000, CX 39 and EX 8, and March 14, 2001, EX 9, and testified at hearing, Tr. at 40-137. He was born on December 8, 1940, in Miami, Florida. Thus he was 60 years old at the time of the hearing. He attended high school and two years of college. He attended college on a football and baseball scholarship which he lost when he did not keep his grades up. After he left college, he worked cleaning a pie factory in Richmond, Virginia. Then he moved to New York City, where he held several jobs. He worked making plaster statuary for about ten years. He started not knowing anything, and ended up running the business. He was responsible for all aspects of the operation, including shipping, sales, marketing and bookkeeping. He also worked as a clerk in the stock room of the men's department at Gimbel's Department Store for a year or two, and ran a store for Sunnyvale Farms. When he returned to Miami, he was out of work for a couple of years due to hernia surgery. Then he taught three- to five-year-old children in a Head Start program for eight years. He also worked for several construction companies, where he was trained as a carpenter, although he was never licensed. He continued doing carpentry as a hobby. He considers himself a handyman, and did handyman and lawn work for people in his church. His most recent carpentry project was assisting someone working on a backyard shed, sometime before his accident. He has not done any carpentry work since his accident. Sometime in the 1980's he began working as a longshoreman at the Port of Miami. He went back and forth between construction and longshore work, doing handyman work or unloading trucks and setting up displays at the Miami Beach Convention Center between jobs. He said he did not report his earnings from handyman work to the IRS.

Lovester Montgomery is the assistant fund manager of the welfare and pension benefits office operated jointly by the International Longshoremen and longshore employers. He was

deposed on January 19, 2001. CX 40. He worked as a longshoreman for 25 years before he began working for the fund. He is responsible for keeping track of the hours longshoremen work for the Port of Miami. He testified that common laborers, also called gangmen, who were not new employees, were making $19.50 per hour in 1999, with a $2 increase in 2000. He explained that longshoremen do not work every day. They work by seniority. When first entering the union, a casual card is issued. The next level is a union, or U card. After about five years, the member can progress through different benefit levels starting with C, progressing to B, A, AA and AAA. Sometime between 1996 and 2000, the number of hours to qualify for container benefits was raised from 700 to 775 hours in one year. An average longshoreman would average working 2.75 days a week from a five-day week, Monday through Friday. Regular weekdays are paid on straight time; time after five or on weekends is overtime, paid at time and a half. Longshoremen working over 700 (now 775) hours would be entitled to vacation and royalties, which are paid at different levels before and after the first five years. Mr. Marshall testified at his March 2001 deposition that he never qualified for vacation or container royalties, but did receive some strike pay.

At the hearing, Mr. Marshall testified that because he had never worked the 700 hours in a year required to become a member of the longshore union, he had worked the hardest jobs at the port, such as the chain gang boat, tying down trucks with heavy chains. The union provided a report of the companies and the number of hours worked by Mr. Marshall from November 1996 to July 2000, and a copy of his "line posted" history showing hours worked by fiscal year from 1993/1994 to 1999/2000. EX 10. Union records by fiscal year showed that he worked 208.5 hours in fiscal year 93/94; 389.5 hours in 94/95; 164 hours in 95/96; 160 hours in 96/97; 124 hours in 97/98; 25.5 hours in 98/99; and 45 hours in 99/00. The report of hours worked by month and employer showed 47 hours in calendar year 1996 (November and December only), 125 hours in 1997, 112 hours in 1998, and 70.5 hours in 1999. Mr. Marshall testified that he worked close to 700 hours in 1994-1995. He thought he had over 600 hours, and was only just short of qualifying for membership. On cross examination, however, he said that he was working four or five days a week in 1994 or 1995, but as a scab. Copies of his tax returns were obtained after the hearing. EX 1. The IRS had no record that he filed returns for 1991 through 1993. In 1994, Mr. Marshall's return showed he earned $4712.63 from Universal Maritime Services. In 1995, his return said he earned a total of $12,905.00, with W-2's attached from various employers, including $442.66 from Overnight success Construction, $205.17 from Eagle Management Group, Inc., $405.00 from Continental Stevedoring & Term, $6964.80 from Universal Maritime Services, $76.21 from Freeman Decorating Company, and $99.00 from Nautilus Terminal Operators, Inc. In 1996, he earned a total of $2145.00, including $94.44 from Convention Service, Inc., $256.85 from National Marine Manufacturers, $603.00 from GES Exposition Services, Inc., $708.00 from Universal Maritime Services, and $483.00 from Florida Stevedoring, Inc. In 1997, he filed a joint return with his wife. His wages reflected in W-2's included $1797.00 from Continental Stevedoring & Term, $483.75 from Oceanic Stevedore Co. (*see also* EX 4), $207.00 from I.T.O. Corporation of Florida, and $530.64 from Freeman Decorating Company. The union list from 1997 also showed hours with Florida Stevedoring. His only 1998 W-2's were for $40.84 from Bell Atlantic Corp. and $218.50 from Oceanic Stevedore Co. The union list

showed hours with Continental Stevedoring, R. O. White & Co. and Florida Stevedoring. In 1999, his only reported income was $255.00 from Oceanic Stevedore Co. (*see also* EX 4). The union list also shows hours with Eller-ITO Stevedoring (*see also* EX 3), Universal Maritime Service and Florida Stevedoring (*see also* EX 28). Based on the hours and earnings documented in the record, I conclude that Mr. Marshall exaggerated the number of hours he worked in longshoring in his testimony, and that the union records in EX 10 are the most accurate records available of his longshore work between 1993 and 1999.

At the time of the hearing, he was living alone in a home he owned, but he had been unable to make the payments on his mortgage since his injury, so it was being foreclosed. He is a widower. His wife, whom he had known for 30 years and married February 14, 1995, died on December 6, 1997, of lung cancer. Mr. Marshall testified that he worked as much as possible when she first got sick, but he felt compelled to be by her side as she got sicker. When asked why his hours were so low in 1998, 1999 and 2000, he said he was caring for his mother-in-law, who had had a stroke, and also suffered from breast cancer, Parkinson's Disease and dementia. While caring for her, he did odd jobs. He said she was totally dependent on him. A nurse came in to assist her with bathing, and she went to a day care center during the day. Eventually he got her into a nursing home. Mr. Marshall did not recall when she was admitted. Records from the Jackson Heights Rehabilitation Center establish that she began her stay on April 23, 1999. CX 43; EX 35.[4] Mr. Marshall said he immediately went back to longshore work. He said he intended to work 700 hours so he could qualify for the union, and make as much money as possible. He was working two or three days a week, and earning $800 to $1000 per week, before he got hurt, because he was "hustling." This testimony is not supported by his 1999 tax return or the union records, and I do not credit it.

On the day of the accident, November 19, 1999, he was detaching containers from a small container boat from the Bahamas. In the process of moving from one container to another, he slipped and fell about 16 feet. He landed on both feet, but the most impact was on his right foot. It shook his whole body when he hit the ground. His foot began to swell like a balloon and was turning black. His partner signaled for the crane to pick him up since he could not get out of the hole he was in. He was lowered to the ground in a basket. An ambulance took him to the hospital emergency room nearest his home, Parkway Medical. During his deposition, Mr. Marshall said he did not tell them about any other injuries except his foot, but they examined his neck, head, back and hip. At the hearing, Mr. Marshall testified that at the emergency room, they examined and x-rayed his back and his foot, as he was complaining of severe pain.

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[4]In its Closing Brief at 20, the Employer/Carrier argues that the records should be stricken because they were provided late by the Claimant, their veracity cannot be confirmed, and the Claimant changed his testimony regarding the date of his mother-in-law's admission to the nursing home between his deposition and the hearing. Throughout his testimony, the Claimant was very vague about dates. I do not consider this to be particularly significant. I see no indicia of unreliability in the documents, and found them to be helpful in establishing the sequence of events.

The next day he was referred to Dr. Jay Stein. He said he told Dr. Stein that his back felt "displaced," and that he was having problems in his upper, lower, and mid-back, mostly on the right side. Dr. Stein took x-rays of his back. Dr. Stein referred Mr. Marshall to Dr. Lawson for surgery on his foot, which had a severe fracture. During the surgery, Dr. Lawson put pins in his foot to put the bones back as close as possible to the original alignment. After the surgery, he was in a cast and had two crutches. He started physical therapy and continued using the crutches about two or three months after the cast was removed. He complained that the pain in his foot was too severe for the things the therapists had him doing, such as riding a bicycle and doing toe-ups. Eventually the therapy stopped because they thought they may be causing more damage than help.

Mr. Marshall said he told Dr. Lawson about his back pain, but Dr. Lawson told him he "didn't do backs." Although Mr. Marshall sought a recommendation from Dr. Lawson of someone to look at his back, the Employer never authorized any physician to treat his back. Mr. Marshall testified that the pain in his back got worse over time. He started getting shooting pains in his buttocks, leading into his leg, and also in his arms. Sometimes his foot is numb. Eventually he went to Dr. Guerra for his back, although he thought the Employer never authorized it. He saw Dr. Guerra three times, but was not able to go back because he could not afford to pay him. Dr. Guerra recommended an MRI.

Mr. Marshall finally had an MRI of his back one or two months before the hearing. The doctor pointed out different numbers on the chart of the spinal chord that were damaged. Mr. Marshall said he never had problems with his back before the accident. He had been very active athletically all his life. Even in his forties and fifties he was a marathon runner. He enjoyed bowling, and playing tennis and racquetball. The accident took him away from cleaning his home properly and keeping up his yard, and he could not stand on his foot for long before it became too painful. Mr. Marshall said he also went to Dr. Fisher, a chiropractor, for adjustments to his back. He paid for those visits himself. At the time of the hearing, he had paid the first three payments, but owed for the last.

Asked at the hearing about how the accident affected his mental state, Mr. Marshall testified that he enjoyed working. He said it is depressing when the bills exceed the income. He dwells on the fact that he can't perform duties around his house or work. He has severe headaches, and problems sleeping. When he went for physical therapy, or used the transportation service for appointments, he had to wait for two or three hours. That made him feel like nobody cared about what was happening to him. He said when he got to talk to a psychiatrist, Dr. Magid, it helped to get his situation, problems and pain off his mind. He could not afford to go back to Dr. Magid because the Employer/Carrier never authorized psychiatric or psychological evaluation. He did not recall whether Dr. Magid wanted him to return. Although when seeking authorization for psychiatric treatment in January 2001, counsel for Claimant told counsel for the Employer/Carrier that Mr. Marshall was increasingly depressed and considering suicide, CX 37, Mr. Marshall himself denied contemplating suicide at his March 2001 deposition. Nor did he report suicidal ideation to either Dr. Magid or Dr. Jarrett.

Asked about a typical day, he said he was very active before the accident. Since then, he could not do any of the things that he enjoyed before. He took a one-hour class to learn how to prepare food fast so he would not have to stand on his foot too long. He does less reading than before because he has headaches, and is fatigued and groggy from medication. During his deposition in December 2000, he said he had no difficulties driving. In March 2001, he said he was in a lot of pain when he drove, especially when he put the brake on. At the hearing, he said he is able to drive, but it is difficult because of pain and discomfort sitting in the car. He has trouble getting to sleep, and wakes with pain. He does his own shopping and cleaning, as there is no one else to do it. He is not as social as he used to be; he complains about pain, "and people don't want to hear that."

His foot is uncomfortable, and he has pain, numbness, a burning sensation, and a pinched nerved pain on the top of his foot. If he does prolonged walking or standing, it swells and becomes very painful. He uses a cane most of the time. He also described pain in his upper and lower back, affecting his breathing, arms and the back of his legs.

On cross examination, he said he is receiving about $900 per month in temporary total disability benefits, and $995 per month from his wife's Social Security, and no other income. He was turned down for Social Security disability benefits. When asked during the hearing whether he would accept a job within the restrictions imposed by Dr. Lawson, he said he cannot do the work he used to do at the port, and thinks it is unsafe for him to attempt other work because he has not gotten proper treatment. He said he would accept a job, "If it wasn't too painful." He was unaware of any job opportunities identified by the Employer/Carrier's vocational expert until the week before the hearing. He denied that his depression resulted from the death of his wife. He said he has not conducted any job search on his own.

The Employer/Carrier offered the testimony and reports of Raquelin Fals as a vocational expert. Ms. Fals is a rehabilitation case manager employed by Innovative Resource Group. She has a master's degree in psychology, and is a qualified rehabilitation service provider with the State of Florida and a certified disability management specialist. She does not hold any national certifications. She has been qualified as an expert in vocational rehabilitation in proceedings before the Dade County courts and Florida workers' compensation courts. She met with Mr. Marshall on May 9 and 14, 2001, to perform a vocational assessment, and prepared a report dated May 18, 2001, which was admitted into evidence. EX 29. She reviewed Mr. Marshall's medical, educational and vocational history, and administered vocational tests. She also visited Dr. Larson's office for updated medical information. In her report, she recited a plan to obtain additional medical information, conduct a labor market survey, contact the Employer to determine whether alternate or modified work was available, conduct job development, and provide guidance and supportive counseling as needed. She later developed job leads she believed to be within Mr. Marshall's medical restrictions which were communicated to Claimant's counsel beginning on July 6, 2001. At hearing, Claimant's counsel objected to the admission of the evidence regarding jobs she identified as employment opportunities for Mr. Marshall because they were communicated too close to the hearing to allow the Claimant a chance to determine whether

they constituted suitable alternate employment. I reserved ruling, allowed the Employer/Carrier to present the evidence, and then concluded that the objection should be sustained. I admitted the May 18 report, but excluded evidence regarding job leads provided on or after July 6, 2001, leaving the excluded evidence in the record to serve as an offer of proof. *See* Tr. at Tr. at 6-9,166-170, 190-200. As a result, there was no evidence admitted to sustain the Employer/Carrier's burden to establish the availability of suitable alternative employment.[5] After the hearing, the Employer/Carrier submitted copies of correspondence between Dr. Lawson and Ms. Fals, communicating which of the jobs she identified he approved as being consistent with Mr. Marshall's limitations. I have added this submission to the record as EX 33, but have not admitted it as it relates to the excluded portion of Ms. Fals' evidence.

Medical Evidence

The records of Mr. Marshall's November 19, 1999, visit to the emergency room at Parkway Regional Medical Center are found at CX 1. The chart notes indicate that upon arrival, Mr. Marshall complained of right and left foot pain following a slip and fall of eight feet while at work, with no other complaints. The musculoskeletal examination noted that his right foot was grossly swollen. The orders included x-rays of his right foot, ankle and heel, but not his back.[6] The impression of the radiologist was comminuted displaced intra articular fractures at the bases of the second and third metatarsal bones with question of involvement of the first metatarsal. Diagnoses were fracture of the right foot, and left heel contusion. Mr. Marshall was given a splint, crutches, and a prescription for Percoset.

EX 21 contains copies of the Employer's First Report of Injury or Occupational Illness to the Department of Labor, dated November 19, 1999; a notification of initial treatment to the Carrier; a recommendation for a referral to an orthopedist; and a referral to Dr. Stein, from Dr.

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[5]In its Closing Brief at 30, n. 1, the Employer/Carrier urges reconsideration of my ruling based on *Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990), holding that job leads need not be communicated to a claimant to establish that suitable alternative employment exists. This argument misapprehends the basis for my exclusion of the evidence. In the Notice of Hearing and Prehearing Order, the parties were instructed to exchange expert reports by April 20, 2001, and exhibits by July 9, 2001. The purpose for requiring the early exchange of expert reports is to give the parties an opportunity to prepare rebuttal evidence. Counsel for the Claimant objected to admission of the testimony and correspondence regarding job leads because he did not receive the correspondence until July 9. Tr. at 6. My ruling excluding the evidence was based on my conclusion that such late submission of expert evidence was unfairly prejudicial to the Claimant's preparation of his case, including cross examination of Ms. Fals, and that the prejudice could not be cured by holding the record open.

[6]At the hearing, Mr. Marshall testified, "In the emergency room they immediately examined me from my upper and lower back because I was complaining that I was in severe pain." Tr. at 73. I conclude that this testimony was untrue.

Irwin Potash of the Port of Miami Medical Clinic, dated November 22, 1999. Mr. Marshall did not recall ever seeing Dr. Potash.

Dr. Jay Stein, an orthopedic surgeon, examined Mr. Marshall on November 22, 1999. CX 2 and EX 20. Mr. Marshall reported that the fall was 16 feet, and that he had immediate pain in the right foot. Since his treatment at the emergency room, Mr. Marshall noted the onset of symptoms in his neck, back and left foot. Physical examination revealed no spasm in the cervical region, and discomfort at the mid-lumbar region. Both feet were swollen, the left mildly, but with normal ankle motion. X-rays of the cervical spine revealed multiple level cervical spondylosis, and of the lumbar spine, sclerosis at L3-4 and degenerative changes. No bony abnormality was noted. X-rays of the right foot confirmed multiple fractures; the left ankle was normal. Dr. Stein's impression was multiple metatarsal fractures with displacement and metatarsal tarsal joint injuries right foot; contusion os calcis bilaterally; mild spurring of the left ankle; cervical spondylosis; and degenerative disc disease L3-4 with degenerative osteoarthritic changes lumbar spine. Dr. Stein applied a bulky compression dressing to the right foot, advised Mr. Marshall to elevate and put no weight on it, and recommended evaluation by a surgical orthopedist as he thought reduction with fixation would lead to a better clinical result.

Mr. Marshall was next seen by Dr. Rodolfo Lawson on November 24, 1999. CX 4 and EX 23. Dr. Lawson examined his foot and reviewed the x-ray films. He recommended open reduction and internal fixation of the fracture dislocation of the right foot. The surgery was performed on November 28, 1999. CX 5, 6, 7 and EX 23. The fractures were fixed with wire and pins, and Mr. Marshall was given a short leg cast. Dr. Lawson saw Mr. Marshall in follow-up to the surgery on December 1, 10, and 22, 1999; the cast and wires were removed, and Mr. Marshall was given a post op shoe. CX 9, 10 and EX 23. On January 5, 2000, he was observed to be healing, changed from crutches to a cane, and referred to physical therapy, continuing on out of work status. On February 9 and March 17, he was still healing, continuing physical therapy and out of work status. CX 11 and EX 23.

On April 11, 2000, Mr. Marshall visited Dr. Lazaro Guerra, an orthopedic surgeon. Mr. Marshall told Dr. Guerra he still had neck and back pain, which radiated to the right lower extremity. On physical examination, Dr. Guerra observed 1+ muscle spasm along the paravertebral muscle group and decreased motion at the cervical spin to the last 5 degrees on all planes. Upper extremities were unremarkable. Reflexes and strength were equal bilaterally at both lower extremities. Mr. Marshall reported decreased sensation along the right lower extremity. Straight leg raising was negative, and there was good range of motion at both hips and knees. X-rays of the cervical spine showed osteoarthritic changes and spondylosis. X-rays of the dorsal and lumbar spine showed straightening of the normal lordotic curve, secondary to spasms, and decrease of the intervertebral space between L3 and L4. Dr. Guerra's impression was cervical dorsal and lubmosacral spine sprain and strain; lumbar radiculitis; and osteoarthritis of the cervical and lumbar spine. Dr. Guerra recommended an MRI to rule out a herniated disk, physical therapy to the neck and back, three times a week for four weeks, and medication (Zanaflex, a muscle relaxer). CX 15, 16, 17.

On April 14, 2000, Dr. Lawson saw Mr. Marshall for follow-up to the foot surgery. EX 23. There was moderate tenderness and swelling had decreased. X-ray showed further healing. Dr. Lawson continued Mr. Marshall on out of work status and prescribed Ultram for pain.

Dr. Lawson saw Mr. Marshall in follow-up again on May 17, 2000. At that time there was tenderness and moderate residual swelling. X-ray still showed the fracture line clearly with some residual subluxation of the tarsal metatarsal joints. Dr. Lawson assessed traumatic arthritis in the right foot. He recommended that Mr. Marshall continue increasing his level of activities and placed him on limited duty status for the next two months. On July 11, 2000, Dr. Lawson recommended an orthopedic second opinion and that Mr. Marshall remain on limited duty status in the meantime EX 23.

Dr. Guerra saw Mr. Marshall again on July 18, 2000. Mr. Marshall still had tenderness to the lower back with radiation to the lower extremities. Dr. Guerra referred him to physical therapy, requested an MRI, and gave him another prescription for Zanaflex. CX 18.

On September 5, 2000, with pain and swelling to his right foot, Mr. Marshall was examined for a second opinion by Dr. Clifford O'Connor. CX 19. Dr. O'Connor referred Mr. Marshall for six weeks of physical therapy and massage therapy for his right foot, and to Dr. Joel Stein for follow-up management, evaluation and treatment of cervical and lumbar pain.

On January 5, 2001,[7] Mr. Marshall went to Dr. Ryan Fisher, a chiropractor, complaining of lower back pain, worse on the right side, radiating down the right leg to the back of the knee and foot; neck pain on both sides with radiating pain and numbness to both arms and hands; mid back and upper back pain on both sides; daily headaches; difficulty sleeping; loss of balance; and swelling in the right foot and ankle. Dr. Fisher performed a physical examination and cervical, thoracic and lumbar studies of the spine. Dr. Fisher diagnosed severe myofascial strain and irritation of the lumbar spine attended by L3, L4, L5 and sacral subluxations and lumbalgia; severe hyperflexion/hyperextension injuries throughout the upper spine, particularly of the cervical spine, causing nerve root compressions; trauma and inflammatory reaction to paravertebral soft tissues with nerve root involvement especially traced to the subluxation complex of C1, C2, C5, C6, T1, T2, T3, T4 and T5. In his report prepared on January 18, 2001, Dr. Fisher stated that Mr.

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[7]The date of the report and the date of the accident at the top of Dr. Fisher's report have been altered by hand to 2000 and 1999, respectively. There is no information in the record as to who made the alterations. I cannot read the dates as they originally appeared. The body of the report states that the initial examination took place on January 5, 2000. As the report refers to progression of the injury over14 months, however, and bears a fax date of Jan. 18, 2001, I conclude that the examination took place on January 5, 2001, and the report was prepared on January 18, 2001. This conclusion is consistent with Mr. Marshall's testimony at hearing that he complained for a year and a half and never received treatment for his back, *see* Tr. at 79, and his testimony at his March 14, 2001, deposition, that he was "recently going to a chiropractor," EX 9 at 5.

Marshall was receiving supportive and palliative treatment, including specific correction of osseous disrelationship and manual traction to allow general mobilization and to relieve nerve stress. Dr. Fisher opined that the problems Mr. Marshall was having with his spine were a direct result of the November 19, 1999, accident, which were not properly addressed and had progressed over the past 14 months. The report noted that Mr. Marshall was being treated on a cash basis, paying out of pocket. CX 12.

Dr. Gary Magid, a psychiatrist, evaluated Mr. Marshall on January 8, 2001. Dr. Magid took social and medical histories, and performed a mental status examination. Dr. Magid diagnosed a Depressive Disorder, N[ot] O[therwise] S[pecified], from the accident on November 19, 1999. He said Mr. Marshall was becoming increasingly depressed and having difficulty coping with pain, restricted activity level, and concerns about control over his life. He recommended intensive therapy for four to six months and antidepressant and analgesic medication.

Dr. Guerra was deposed on January 23, 2001. CX 41and EX 6. He has been board certified in orthopedic surgery since 1979. His practice is general orthopedics. About 50% of his practice is arthroscopic surgery; he also does quite a number of joint replacements. He testified about his review of Mr. Marshall's records and his own examinations. Dr. Guerra stated that the muscle spasm he observed was an objective sign of injury, while limitation of motion was a combination of subjective and objective findings. He said that the x-rays revealed osteoarthritic changes, and that the straightening of the lordotic curve was due to muscle spasm. He also acknowledged the foot injury, which was being treated by Dr. Lawson. Dr. Guerra gave the opinion that the cause of all the diagnosed conditions was the fall on November 19, 1999. He confirmed that he recommended physical therapy, medication and an MRI. He had not seen Mr. Marshall since July 18, 2000. He deferred to Dr. Lawson's opinion about Mr. Marshall's foot, but he did not believe Mr. Marshall had reached maximum medical improvement as to his back. He said that the decrease of the intervertebral space is indicative of wearing out of the disc space which can be caused by a disc herniation. He said that a fall on the feet increases the pressure through the spine, which can cause fractures to the lumbar spine, as well as to the heels. He testified that a delay in complaints of injuries is not unusual, and that Mr. Marshall's fall could have caused his back problems or aggravated an underlying condition, causing symptoms where there were none before. His bill for $1085.00 had not been paid. He was unwilling to assess specific work restrictions without an MRI, but would give the usual restrictions for anyone with a back injury. On cross examination, he agreed that the osteoarthritic changes and spondylosis more likely than not preexisted the incident. He did not feel that an MRI of the cervical spine was warranted. He also agreed that the findings on the x-rays of osteoarthritic changes and spondylosis would be expected from someone of Mr. Marshall's age, even without the trauma. The usual restrictions for back injury were as to repetitive bending, climbing or kneeling, prolonged walking or squatting, and limitation of lifting to 15 or 20 pounds. It is common in his practice to look for any signs a patient needs psychiatric treatment. Dr. Guerra saw no reason to make a psychiatric referral for Mr. Marshall.

Mr. Marshall saw Dr. Lawson again on February 1, 2001. CX 22. Mr. Marshall complained of residual pain in his left foot and lower back, radiating down to the lower extremities. Examination showed decrease in the swelling of the right foot, with moderate tenderness and reduced range of motion of the ankle. Dr. Lawson's assessment was status post right foot tarsal-metatarsal fracture and dislocation with residual traumatic arthritis, and low back pain. Dr. Lawson stated that Mr. Marshall had reached maximum medical improvement of his foot, and gave him a prescription for a left foot in-sole to balance his right foot in-sole, and a cane. He placed Marshal on permanent limited duty status with restriction of not lifting more than 20 lbs. and avoid activities including prolonged walking, running or climbing, and assessed a permanent impairment of 10 % of the whole person due to the residual loss of motion and residual arthritis. Dr. Lawson stated that Mr. Marshall's main site of complaint at the time was his low back pain, of which he had complained since early episodes. In Dr. Lawson's opinion, the low back pain was related to Mr. Marshall's workman's compensation injury and he should receive evaluation and treatment of this condition by a back specialist. No return appointment was given for Dr. Lawson's office.

An MRI of Mr. Marshall's lumbar spine was taken on May 10, 2001, on referral by Dr. Guerra. The impression of the radiologist was posterior herniated nucleus pulposus at L5/S1 causing impingement of the ventral aspect of the dural sac; posterior herniated nucleus pulposus at L4/L5 in the midline associated with facet and ligamentum flava hypertrophy causing moderate central stenosis and mild bilateral encroachment of neural foramina; almost complete loss of the intervertebral disc space at L3/L4 with posterior osteophytes causing impingement of the ventral aspect of the dural sac; right posterolateral herniated nucleus pulposus at L2/L3 causing impingement of the ventral aspect of the dural sac and mild encroachment of the right neural foramen; and posterior bulging of the intervertebral disc at L1/L2 causing impingement of the ventral aspect of the dural sac. CX 23. Claimant's counsel submitted an insurance claim form for the MRI in the amount of $1800.00. CX 24.

Dr. Thomas Zwick, a podiatrist, examined Mr. Marshall on May 17, 2001, on behalf of the Employer/Carrier. EX 30. Mr. Marshall complained of burning in both legs and feet, but mainly in the right foot. Mr. Marshall was using support hose to control swelling in the foot. He was also using an orthotic insert for his right foot, but said he never received the left. On examination, he had some decreased sensation and reduced range of motion in his right foot. Dr. Zwick also took an x-ray. His impression was status post fracture of metatarsal 2, 3, 4 and 5–Lis Franc's type injury, right foot; status post open reduction internal fixation of the fracture; chronic edema right lower extremity controlled with support hose; mild loss of sensation to right foot probably secondary to edema as opposed to local nerve injury; arthritic changes at midfoot with loss of range of motion / slight metatarsusadductus; rule out higher level of nerve involvement / spinal injury. He recommended evaluation by a neurologist to rule out any higher level of injury. He also recommended a pair of inserts for Mr. Marshall's shoes, as one insert will misalign his

spine and may aggravate back problems.[8] With regard to the arthritic changes Dr. Zwick recommended shock absorbing supportive type shoes. He assigned an impairment rating based on the Florida impairment rating guide.

Dr. Paul Jarrett, a psychiatrist, examined Mr. Marshall on May 18, 2001, for the Employer/Carrier. EX 32. Dr. Jarrett was deposed on August 16, 2001. EX 34. Dr. Jarrett is board certified in psychiatry and neurology, and has been a practicing psychiatrist for 50 years. He reviewed Mr. Marshall's medical records and interviewed him at length. Although Dr. Magid's report was not listed in Dr. Jarrett's report as one of the medical reports he reviewed, it appears that Dr. Jarrett had Dr. Magid's report available to him at the time of the examination, and that he did review it. *See* Exhibit C to the Deposition. [9] In his report, Dr. Jarrett said Mr. Marshall's stream of thought was connected and coherent, and that he was in good rapport and showed good comprehension. His memory was intact and there was no evidence of any cerebral organicity. His mental grasp and capacity were consistent with his educational and occupational background. Dr. Jarrett described him as focused on physical discomforts and expressions of resentment at the way he interpreted the medical management of the consequences of his fall. He said Mr. Marshall had a pleasant, warm, sociable and winning interpersonal contact during the examination, and did not display any evidence of inappropriate irritability. Dr. Jarrett's impression that Mr. Marshall did not fulfill the criteria for post traumatic stress disorder, or any evidence of a major depressive disorder or a depressive affect to interfere with any physical disability. In Dr. Jarrett's opinion, Mr. Marshall's disabilities lay outside the field of psychiatry, and his conditions were not attributable to a mental disorder. He thought Mr. Marshall would not need psychiatric treatment for anything relevant to the accident. During his testimony, Dr. Jarrett said that the examination of Mr. Marshall took about three hours, and confirmed his findings. On cross examination, Dr. Jarrett did not agree that Mr. Marshall had the symptoms of depressive order, not otherwise specified, as defined in the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. ("DSM-IV"). He reiterated that Mr. Marshall had no depressive affect, and that his opinion was that Mr. Marshall was not suffering from any form of clinical depression.

Dr. Goetano Scuderi, an orthopedic surgeon, examined Mr. Marshall on May 21, 2001, and testified on behalf of the Employer/Carrier. EX 31; Tr. 207-264. Dr. Scuderi is board certified in orthopedic surgery since 1995; he is a fellowship trained spinal surgeon. Dr. Scuderi reviewed Mr. Marshall's medical records, including the May 10, 2001, MRI, and depositions of Mr. Marshall and Dr. Guerra. He took a history from Mr. Marshall, and conducted a physical

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[8]The record dose not disclose why Mr. Marshall did not receive the insert for the left foot prescribed by Dr. Lawson in February 2001.

[9]Counsel for the Claimant objected to the admissibility of Exhibit C as a report different than the report (EX 32, and Exhibit B to the Deposition) admitted at hearing. Based on Dr. Jarrett's testimony, however, EX 34 at 8-9, I conclude that Exhibit C is not a report, but a transcription of dictation Dr. Jarrett created as part of his preparation for the examination. I find that Exhibit C is admissible and overrule the objection.

examination. He had not seen Dr. Stein's records at the time of the examination, but reviewed them before the hearing and noted that contrary to the longer delay recorded in Dr. Stein's notes, Mr. Marshall had complained of neck and back pain within a week after the original injury. Dr. Scuderi reported and testified that Mr. Marshall "exhibited a marked symptom magnification throughout the exam . . ." As a result of positive Waddell's signs, Dr. Scuderi used non-direct methods to establish range of motion. He found equal reflexes, essentially full range of motion and no spasm or tenderness with the lumbar spine. His impression in the report was status post a significantly traumatic injury to the right foot and development of lumbar pain most probably due to the altered gait. He reported that the MRI scan was consistent with multiple-level degenerative disc disease, and that herniated discs at multiple levels do not occur after trauma. Dr. Scuderi testified that except for the right foot which had significant lack of motion in the ankle, the examination of the lower extremities was normal, i.e., there were no sensory, reflex or motor problems which would result from a symptomatic herniated disc. There was no evidence of any nerve root irritation or splinting that would prevent regular activities for a person of Mr. Marshall's age. Dr. Scuderi reiterated that the MRI was consistent with multi-level degenerative disc disease. There was no evidence of any acute trauma. He said Mr. Marshall showed spondylitic changes in his cervical and lumbar spine consistent with aging. Dr. Scuderi opined that there was no permanent impairment with regard to Mr. Marshall's lumbar spine as a result of the injury. He would give no restrictions with regard to the spine in connection with the November 1999 accident, although based on the MRI, he would give restrictions similar to those for the foot. Nor did he believe that Mr. Marshall would require any medical treatment for his lumbar spine resulting from the accident. In his report he stated that the treatment being rendered to Mr. Marshall's back was related purely to his pre-existing condition.

On cross examination, counsel for the Claimant asked whether someone with pre-existing back problems would be more likely to feel pain in the back after a fall like Mr. Marshall's. Dr. Scuderi testified that in his experience treating patients with falls from heights, they all have similar injury patterns regardless of their age. It would be common for them to have foot injuries with concomitant lumbar fractures. Such a patient would have significant pain in the back, of which there was no evidence in the emergency room in Mr. Marshall's case. Dr. Scuderi did not agree that Mr. Marshall "has a bad back." Rather, he said Mr. Marshall "has a degenerative back that's consistent with a multiple level degenerative disc disease." Absent physical findings that correlate to the specific nerve, the diagnosis of herniated disc with encroachment of the neural forum would not support surgery. He reiterated that on his examination, there was no evidence to suggest that any of Mr. Marshall's herniated discs are symptomatic. He said that herniated discs do not increase the risk of injury from lifting or other activities. He agreed that it is common for persons of Mr. Marshall's age to have similar MRI results and be asymptomatic. He did not believe Mr. Marshall needed any treatment for his back. Finally, he concluded that Mr. Marshall's five herniated discs were pre-existing, long-standing problems and none occurred in the accident.

Compensable Injuries

To establish a prima facie claim for compensation, a claimant has the burden of

establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. 33 U.S.C. § 920(a); *Hunter*, 227 F.3d at 287.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts--not mere speculation--that the harm was *not* work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-688 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Citing *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986), the Fifth Circuit further elaborated in *Conoco*:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Conoco, Inc., 194 F.3d at 690 (citations omitted and emphasis in original, going on to state that the hurdle for the employer is far lower than a "ruling out" standard); *see also Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.* 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption."). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

The parties agree that Mr. Marshall suffered a permanent impairment to his right foot from the fall. They disagree whether the fall also caused any injury to his back, or any psychiatric impairment. Although Mr. Marshall has established a prima facie case that such problems could have resulted from the fall, I conclude that the Employer/Carrier has successfully rebutted the Section 20(a) presumption, by introducing the testimony of Drs. Scuderi and Jarrett. I must therefore weigh all of the evidence relevant to the causation issue.

With respect to Mr. Marshall's back, there are several medical opinions in the file. Dr.

Stein, the orthopedist who examined Mr. Marshall within a week of the accident, x-rayed his back as well as his feet. Dr. Stein diagnosed only degenerative changes to Mr. Marshall's spine. Although Dr. Lawson, the orthopedist who performed the foot surgery, expressed an opinion that Mr. Marshall's low back pain was related to the workman's compensation injury, he did not evaluate or treat Mr. Marshall's back himself, or offer any explanation of the basis for his opinion. I give little weight to Dr. Fisher's opinion that Mr. Marshall had a spine problem related to the accident, as he is a chiropractor, and less qualified than the orthopedists. Dr. Guerra and Dr. Scuderi, both orthopedists, agreed that a fall from height can cause vertebral fractures, but neither said that such an injury occurred in Mr. Marshall's case. Both also agreed that Mr. Marshall had a pre-existing osteoarthritic changes and spondylosis in his back. Despite their agreement on these points, Dr. Guerra offered an opinion that the fall could have caused back pain or aggravated an underlying conditions. His opinion, however, was equivocal and conclusory. Dr. Guerra did not offer any very specific explanation of how Mr. Marshall's alleged symptoms were related to the fall. Dr. Scuderi, on the other hand, provided a detailed and well-reasoned explanation of his opinion that the accident may have caused a transient problem with low back pain as a result of Mr. Marshall's altered gait, but there was no permanent impairment or treatment required for Mr. Marshall's back as a result of the fall. As a fellowship-trained spinal surgeon, Dr. Scuderi was the best qualified of all the doctors who evaluated Mr. Marshall's back. He examined Mr. Marshall, and reviewed his medical records, including the results of the MRI. He concluded that Mr. Marshall was magnifying his symptoms. Based on the evidence as a whole, I find that there was no compensable injury to Mr. Marshall's back.

Similarly, two psychiatrists offered diametrically opposed views of Mr. Marshall's mental state. Dr. Magid, who met with Mr. Marshall once in January 2001, diagnosed a Depressive Disorder, NOS. Dr. Jarrett, who met with Mr. Marshall in May 2001, on the other hand, did not diagnose any mental disorder. His opinion was bolstered by Dr. Guerra, who saw Mr. Marshall in April and July 2000, and saw no reason to make a psychiatric referral. Nor did any of the other physicians who examined Mr. Marshall remark that he appeared depressed. Again, based on the evidence as a whole, I find that there was no compensable psychiatric impairment.

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 CFR §§ 702.401, 702.402. In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). In this case, as I have found that only the foot injury was work related, the Employer/Carrier is responsible only for treatment and medical expenses related to the foot. The record does not disclose any unpaid medical expenses for the compensable injury.

The Nature and Extent of the Claimant's Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which

the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981). The parties have agreed, based on Dr. Lawson's assessment, that Mr. Marshall reached maximum medical improvement, and hence, permanent impairment of his foot, on February 1, 2001.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). A doctor's opinion that return to the employee's usual work would aggravate his condition may support a finding of total disability. *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable

alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*,841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). An employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In this case, there is no dispute that Mr. Marshall is restricted to light duty work, and is therefore unable to perform his former longshore work, which Ms. Fals classified as heavy work. Mr. Marshall has made his prima facie case of total disability. I have excluded the evidence regarding alternative jobs provided by Ms. Fals, and there was no other evidence of suitable alternative employment. On the record before me, therefore, I conclude that Mr. Marshall is totally disabled.

The Claimant's Average Weekly Wage and Compensation Rate

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343-344 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 139 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543, 545-546 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244, 247-249 (1976), aff'd sub nom. *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979). Sections 10(a) and 10(b) apply where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. Mr. Marshall's work was not regular and continuous. Therefore I must look to subsection (c).

Unlike Sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822-823 (5th Cir. 1991); *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). It would be unfair to look only at the one year preceding the injury when the work is slow one year and then busy the next, or vice versa. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987). In calculating annual earning capacity under Section 10(c), the judge may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair

and reasonable alternative. The ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990). An administrative law judge calculating average annual earnings by considering the claimant's earning history over a period of years prior to the injury must take into account the earnings for all years during the period to reasonably represent the claimant's annual earning capacity. *Anderson*, 13 BRBS at 596.

Mr. Marshall's admitted failure to report all his earnings on his tax returns means that documented earnings from all sources may underestimate his previous earnings. Furthermore, I have found his testimony on the hours he worked in longshoring, which can be checked against union records, to be unreliable, and would not expect testimony on unreported income to be reliable, either. In any event, Mr. Marshall was not asked to estimate his earnings from unreported sources. I conclude that the only equitable way to calculate an average weekly wage in this case is to average Mr. Marshall's earnings between 1994 and 1999, which are documented in some fashion in the record, i.e., by tax returns, W-2's and union records. Although counsel for Mr. Marshall argued that he should not be penalized for taking himself out of the job market to care for his wife and mother-in-law, Mr. Marshall's testimony that he supported himself with odd jobs, suggests that he was not out of the job market entirely even during those periods. I have no basis on which to estimate his earnings from odd jobs, so I have not taken any earnings from that source into account. I have, however, subtracted any months for which no longshore earnings are reflected in the monthly union records (which begin in November 1996) from the sum for averaging. I find that documented earnings include $4713 (from the tax return) in 1994 (counts as one year for purpose of averaging), $12,905 (tax return) in 1995 (counts as one year), $2145 (tax return) in 1996 (counts as one year), $3234 (W-2's and 11 hours with Florida Stevedoring at $19.50 per hour) for 9 months in 1997 (counts as .75 year), $2268 (W-2's and 103 hours of longshore work at $19.50 per hour) for three months in 1998 (counts as .25 year), and $1425 (W-2 and 60 hours of longshore work at $19.50 per hour) for four months in 1999 (counts as .3 year). Total earnings of $25,390, divided by 4.3 years, results in an average of $5905 per year, divided by 52, results in an average weekly wage of $113.56. Pursuant to Sections 6(b)(2) and 8(a) and (b) of the Act, 33 U.S.C. §§ 906(c) and 908(a), Mr. Marshall is entitled to receive temporary total disability payments of $113.56 per week commencing November 20, 1999, and permanent total disability payments of $113.56 per week commencing February 1, 2001.

Section 14(j) of the Act provides, "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j). Section 14(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *aff'd on recon.* 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989); *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 21 (1986), *rev'd on other grounds*, 948 F.2d 941 (5th Cir. 1991). In this case, the Employer/Carrier has been paying temporary total disability compensation at the rate of $225.32

per week since Mr. Marshall was injured. It is entitled to a credit for those payments.

Section 14(e) Penalty

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, the employer shall be liable for an additional 10% penalty of the unpaid installments unless the employer files a timely notice of controversion as provided in § 14(d). 33 U.S.C. § 914(e). The penalty also applies if the employer pays compensation at too low a rate. As the Employer/Carrier paid compensation voluntarily, and at a greater rate than due, there is no 14(e) penalty due.

Interest

Claimant would be entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro,* 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). In this case, however, the Employer/Carrier paid benefits at a higher rate than was due. For this reason, Mr. Marshall is not entitled to any interest.

Attorney's Fees

Fees for claimants' representatives are addressed in the Act and the regulations at 33 U.S.C. § 928 and 20 CFR §§ 702.132 – 135. The Act prohibits the charging of a fee in the absence of an approved application. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections.

ORDER

The claim for benefits filed by Gus Marshall is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall pay temporary total disability compensation to the Claimant from November 20, 1999, to January 31, 2001, at a compensation rate of $113.56 per week, in accordance with Sections 6 (b)(2) and 8(b) of the Act, 33 U.S.C. §§ 906(b)(2) and 908(b).

2. The Employer/Carrier shall pay permanent total disability compensation to the Claimant beginning February 1, 2001, at a compensation rate of $113.56 per week, in accordance with Sections 6 (b)(2) and 8(a) of the Act, 33 U.S.C. §§ 906(b)(2) and 908(a).

3. The Employer/Carrier is entitled to a credit for temporary total disability compensation paid from November 20, 1999, to the present.

4. The District Director shall make all calculations necessary to carry out this order.

5. Employer/Carrier shall pay Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related injury to his right foot on November 19, 1999, pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a).

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant and opposing counsel, who shall have ten (10) days to file any objections.

A

Alice M. Craft
Administrative Law Judge